No. 20,108

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AARON NEWMAN, DANIEL NEWMAN, PAUL NEWMAN AND CARL NEWMAN, A PARTNERSHIP d/b/a COLONY FURNITURE COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against the respondent on November 15, 1963, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The

Board's decision and order (R. 41-43)[1] are reported at 144 NLRB 155; a subsequent Board order (R. 44-45), issued on the Board's own motion to clarify the November 1963 order, is unreported. This Court has jurisdiction, the unfair labor practices having occurred in Los Angeles, California.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that the Company refused to bargain in good faith with the Union,[2] in violation of Sections 8(a)(5) and (1) of the Act. The facts upon which the Board's decision rest may be summarized as follows:

A. *Background*

Respondent partnership is composed of Aaron Newman and his three sons, Daniel, Paul and Carl Newman. Aaron holds the majority ownership interest and is in charge of respondent's principal office in Linden, New Jersey. Daniel Newman is in charge of respondent's Los Angeles plant, the only facility involved herein. In June 1960, shortly after the Los Angeles plant was opened, the Union and respondent executed a bargaining agreement covering the pro-

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[1] References to formal documents reproduced as "Volume I, Pleadings" are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References designated "G.C. Ex." are to the General Counsel's exhibits.

[2] Furniture Workers Union, Local 3161, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

duction and maintenance employees working there (R. 24; Tr. 43-44). Roy Taylor, business representative, signed this agreement for the Union; Daniel Newman signed for the Company (R. 24; Tr. 45). After this agreement expired in July 1961, the Union's majority status was put in issue, a Board election was conducted, and the Union was certified in September 1961 as the exclusive representative of the production and maintenance employees at the Los Angeles plant (R. 24; Tr. 46-47).

B. *Contract negotiations commence: the Company bypasses the Union and bargains directly with employees*

Following the certification, negotiations for a new contract commenced. At the first meeting, Aaron Newman appeared for respondent and told Taylor, the Union's representative, that Daniel Newman was currently out of town but would return to "negotiate the contract and sign it with the Union" (R. 24; Tr. 47-48). Aaron also questioned Taylor about the Union's proposal and Taylor presented him with a copy the contents of which were then discussed (Tr. 48).

On about October 2, 1961, the parties held their second bargaining session. This time, Daniel Newman was present as Company representative. Daniel and Taylor discussed a variety of contract topics—including arbitration, pension plan and Union dues—and reached agreement on some terms. For example, Taylor agreed to yield to Daniel's proposal that the existing health and welfare plan be retained. Daniel

also expressed concern that a dues provision in the contract might cause a hardship to some employees who had not been paying dues during the period following expiration of the 1960 contract. Taylor answered that the employees would have 30 days after execution of the new contract, plus an additional period "to work it out some way so it won't be a hardship" (Tr. 49-52).

Daniel Newman then assembled the plant employees in the absence of their Union representative, told them that he had a contract proposal from the Union, and asked the employees to decide among themselves if they wanted him to sign it. He asserted that execution of the Union's contract would require the Company to change its existing health and welfare plan which was "better" than the one proposed by the Union; and that old employees "would have to pay all their dues up [in] . . . one payment . . . and there was no use in them running up to the office and asking them to take out partial payments because they couldn't do it." (Tr. 15).

On October 18, 1961, the Union filed a charge with the Board alleging that Daniel Newman's above-described conduct violated Section 8(a)(1) and (5) of the Act. The Board's General Counsel issued a complaint, but no hearing was conducted. Instead, the parties executed a Settlement Agreement, approved on January 12, 1962, by the Board's Regional Director. In the Settlement Agreement, respondent agreed to post a notice and comply with all its provisions, including the following assurances: "We will not in any manner interfere with, restrain, or coerce our em-

ployees in the exercise of their right to self-organization . . . We will bargain collectively upon request with the [Union and] . . . We will not ask our employees to decide for themselves whether we should execute a collective bargaining agreement with the [Union]." The Regional Director agreed to take no further action in the case "contingent upon compliance" with the terms of the settlement (R. 9-10).

C. *Negotiations continue: the parties reach agreement on all terms*

Meanwhile, from October 1961 to January 1962, the parties continued to meet for contract negotiations (Tr. 52-53), Daniel Newman acting as the Company representative. During these sessions, the Union's proposed arbitration clause emerged as one of the main issues separating the parties. Daniel Newman stated that his father was strongly opposed to arbitration; Taylor replied by noting that such a provision had been incorporated in the parties' last contract. Finally, Daniel asked Taylor to get Aaron's approval first by long-distance telephone. Daniel assured the Union that "his dad would live up to" the provision if Daniel signed but stated that it would be better for Taylor to talk to him first: "maybe you will get him to understand it" (Tr. 61). After listening to Taylor's discussion over the telephone, Aaron responded, "Well, you and Dan go on and work the thing out" (Tr. 61-62).

Thereafter, on several occasions, Taylor was requested by Daniel to discuss a variety of contract details with Aaron by telephone, after bargaining on

the same subjects with Daniel (Tr. 62). Also, on one occasion in January 1962, Aaron appeared at a bargaining session in Los Angeles and—although Daniel was present—did most of the talking for the Company; also, Aaron expressed firm opposition to the inclusion of an arbitration clause (Tr. 122-123, 145). By the end of February, however, respondent's resistance faded and Aaron sent the Union, from his New Jersey office, a written counterproposal containing an arbitration clause (G.C. Ex. 7, 8).

By letter to Aaron Newman dated March 6, Taylor advised that he was dissatisfied with attempting to reach an agreement on a contract through a written exchange of proposals and counter-proposals between himself and Aaron Newman. Taylor further advised the latter that he was requesting the services of the Federal Mediation and Conciliation Service in negotiating a contract with the respondent, and concluded his letter with the following request:

> ". . . [T]herefore, will you please delegate authority to someone locally to negotiate with the Union and a mediator from the Federal Mediation and Conciliation Service in order that we may negotiate further and conclude our negotiations with a signed agreement." (G.C. Ex. 10).

Aaron Newman replied to Taylor by letter dated March 24, concluding with the following language:

> ". . . Our Mr. Dan Newman is and always has been available to negotiate with you. He has had ample authority at all times. Because of my long experience and the good advice of Mr. Joseph Wells, our company lawyer, he naturally con-

sults with us. However, this had not been any cause for delay in arriving at a satisfactory understanding with you." (G.C. Ex. 11).

Negotiations proceeded thereafter in the offices of Federal Conciliator Jules Medoff, centering around the Company's February counterproposal. Daniel Newman told Medoff, in Taylor's presence, that he had authority to negotiate and conclude an agreement (Tr. 76-77), but insisted that no contract would be signed which incorporated the Union's proposed pension plan (Tr. 77). After Taylor consented to omit this provision, the parties reached agreement on all other matters (R. 26; Tr. 78-92). On May 18, Daniel Newman told Taylor to reduce the agreement to writing and "we will sign it" (R. 26; Tr. 91-92, 113). The contract reached was to be effective for one year from May 18, 1962, and from year to year thereafter subject to 60 days' notice (G.C. Ex. 7, p. 12).

D. ***Aaron Newman has a "change of heart" and the Company refuses to execute the May 18 agreement***

Taylor had copies of the contract prepared and sent to Daniel Newman for signature and, after a week or more had passed without response, telephoned Daniel to inquire about the delay. On this and a subsequent occasion, Daniel asserted that he had not yet had time to read the contract (R. 26; Tr. 97-98). Taylor finally informed Conciliator Medoff about the delay. Later, Medoff telephoned Taylor, and told him that Daniel wanted Taylor to meet with Aaron when the latter would be present at the plant. Taylor replied that he had no objection to

meeting with the father, but that he "had no intention of negotiating" because a contract had already been concluded (R. 26; Tr. 99). Medoff assured him that there would be no problem because Daniel had agreed to sign the contract if his father didn't (R. 26; Tr. 99-100).

On about July 18, Taylor met with Aaron and Daniel. Aaron stated that he had had a "change of heart" about the inclusion of an arbitration clause in the contract and wanted to renegotiate the matter (R. 26; Tr. 101, 120). Taylor protested and refused to renegotiate; the Company has refused to this date to sign the contract (*ibid.*).

II. The Board's Conclusions and order

Upon the foregoing facts, the Board concluded that respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union in that it confronted the Union in negotiations with a divided and fluctuating bargaining authority and refused to execute a contract already agreed to. Moreover, the Board ruled respondent's unfair practices subsequent to January 12, 1962, effectively breached the Settlement Agreement of that date and warranted inclusion of respondent's October 1961 conduct in the Board hearing. Such conduct was likewise found violative of Sections 8(a)(5) and (1) as an attempt to undermine the Union's representative status (R. 30-31).

The Board ordered respondent to cease and desist from the unfair practices found, to post an appropri-

ate notice, and to execute the May 18, 1962, agreement upon the Union's request.[3]

Subsequently, on September 14, 1964, the Board issued an Order on its own motion clarifying the above-described Decision. In the September 1964 Order, the Board took administrative notice of a dispute between the Company and the Union over the interpretation to be given the Board's remedy, and acknowledged the existence of a "latent ambiguity" regarding the effective duration of the contract ordered to be signed, upon request. To clarify the intent of its original November 1963 order, the Board ordered insertion in its order of the following italicized clause, thus requiring respondent: . . . "either to execute the foregoing agreement, *this agreement to be effective from May 18, 1962 to at least the next renewal date as provided therein following signature*, or to bargain collectively with the Union . . . ." [4]

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[3] The Trial Examiner's Recommended Order had called for respondent to execute said agreement "forthwith" (R. 32). The Board noted however, that—as of the date of its order—more than a year had elapsed since May 18, 1962 and the Union might no longer desire to insist upon the terms negotiated. Accordingly, the Board ordered respondent to execute the agreement *or* to bargain collectively, depending upon the nature of the Union's request.

[4] On October 1, 1964, respondent filed a motion for reconsideration with the Board, contending that the Order Clarifying Decision constituted a substitution of a new remedial order; the Board denied this motion on November 30, 1964, as lacking in merit (R. 46-48, 50).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Finding of the Board That the Company Failed to Bargain in Good Faith With the Union in Violation of Section 8(a)(5) and (1) of the Act

The test of good faith bargaining is defined in Section 8(d) of the Act as follows:

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation to the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal, or require the making of a concession;
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> * * * *

The function of applying this standard is the Board's, "to determine . . . whether a party's conduct . . . evidences a real desire to come into agreement . . . [by] drawing inferences from the conduct of the parties as a whole." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 498.

As this Court has stated (*N.L.R.B.* v. *Stanislaus Implement and Hardware Company, Ltd.*, 226 F. 2d 377, 380):

> An unpretending, sincere intention and effort to arrive at an agreement is required by statute; the absence thereof constitutes an unfair labor practice. *N.L.R.B.* v. *National Shoes*, 2 Cir.,

1953, 208 F. 2d 688; *N.L.R.B.* v. *Shannon*, 9 Cir., 1953, 208 F. 2d 545; *N.L.R.B.* v. *Nesen*, 9 Cir., 1954, 211 F. 2d 559.

"Good faith" is a state of mind which can be resolved only through an application of the facts in each particular case. *N.L.R.B.* v. *American National Insurance Co.*, 1952, 343 U.S. 395, 410, 72 S. Ct. 824, 96 L. Ed. 1027.

We submit that the facts of this case amply support the bad-faith inference drawn by the Board.

A. *The Divided and Fluctuating Bargaining Authority*

As shown in the Statement, pp. 3, 5-6, respondent deprived the Union—at least from September 1961 until March 1962—of one of the elementary and essential conditions for genuine collective bargaining, i.e., the availability of an authorized negotiator for face-to-face negotiations. Thus, by effectively dividing bargaining authority during this period between Aaron Newman, whose office was in New Jersey, and Daniel Newman, whose office was in Los Angeles, respondent in effect required the Union to negotiate a contract through long-distance telephone calls and written correspondence. Although Aaron Newman told the Union at the start of negotiations that Daniel would be present thereafter to represent the Company (*supra*, p. 3), the subsequent conduct of both father and son made it plain to the Union that the absent father would first have to be convinced before the son would agree. Time and again, Daniel asked the Union to explain contract details for his father's approval (*supra*, pp. 5-6) and, on some occasions, Aaron

appeared at Los Angeles bargaining sessions acting as if he were, in fact, the Company's principal negotiator. As the Board held, effective collective bargaining could not be favored in such a situation of divided and fluctuating authority" (R. 30). See *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 267 (C.A. 2), cert. denied, 375 U.S. 834; *N.L.R.B.* v. *Hibbard*, 273 F. 2d 565, 568 (C.A. 7).

After March 6, as a result of Union protest and insistence upon an effective delegation of authority to a *local* representative, the situation changed. Aaron Newman, in his March 14 letter, gave the Union reasonable ground to believe that Daniel could negotiate and execute a contract (*supra,* pp. 6-7), a belief Daniel himself expressly confirmed to the Federal Mediator (*supra*, p. 7). But respondent can hardly claim that its post-March conduct excuses or moots what went before. *Pacific Coast Ass'n of Pulp & Paper Mfrs.* v. *N.L.R.B.*, 304 F. 2d 760, 765 (C.A. 9). Such a claim would require the unwarranted assumption that the improper division of authority had no impact on negotiations during its occurrence. *Lion Oil Company* v. *N.L.R.B.*, 245 F. 2d 376, 379 (C.A. 8).

B. ***The refusal to execute the agreed-upon contract***

Further evidence of respondent's bad faith is shown by Aaron Newman's "change of heart" on July 18, when he told the Union that he wanted to renegotiate the arbitration clause already accepted by Daniel Newman (*supra*, p. 8). Here, as in *N.L.R.B.* v. *Nesen*, 211 F. 2d 559, 563 (C.A. 9), cert. den., 348

U.S. 820, "respondent failed to recognize agreements reached by his bargaining representative after leading the Union to believe that the bargaining representative had full authority to conclude an agreement." Thus, as already shown, respondent reacted to the Union's demand for an authorized local negotiator by asuring the Union that Daniel Newman had "ample authority" (*supra*, p. 6). In the meetings that followed under the Mediator's auspices, Daniel himself expressly confirmed his father's delegation of authority to him to "negotiate and conclude" an agreement. And at their May 18 meeting, Daniel Newman acknowledged that the Company and the Union had reached agreement on all contract issues, and that he would sign the document when it was prepared (*supra*, p. 7).[5] Admittedly, the prepared draft was an accurate embodiment of the parties' agreement (R. 28; Tr. 148).

The arbitration provision which Aaron subsequently sought to have removed from the contract had been

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[5] Respondent contended before the Board that Daniel had not been authorized to sign a contract without Aaron's prior approval. In light of the evidence summarized above, pp. 6-8, however, there was ample basis for the Board's rejection of this claim.

The fact that the Union's approval of the agreement on May 18 was subject to ratification by the affected employees does not mean, as respondent urged below, that respondent should likewise be free to disavow its representative's agreement. For, as the Board explained, "it is patent that respondent understood at all times during the negotiations that any agreement reached would have to be ratified by the employees, whereas Aaron's representations to the Union's negotiator led the latter reasonably to believe that Daniel could conclude an agreement on behalf of respondent." (R. 41-42; Tr. 119-120).

specifically pointed out to Daniel Newman as a part of the contract agreed upon (R. 26; Tr. 90) and, moreover, was one of the provisions which Aaron Newman himself had presented in the Company's written counterproposal of February 28, 1962. Hence, even if there were a limitation upon Daniel's authority to conclude an agreement, Aaron's "change of heart" was nonetheless a blatant manifestation of bad faith, since he thereby repudiated his own offer after it had been accepted by the Union, after all other contract issues had been settled, and after the lapse of several months without any suggestion by the Company that their offer might be withdrawn.

As already shown, *supra*, p. 10, the Act requires "the execution of a written contract incorporating any agreement reached if requested by either party . . .". Hence, respondent's refusal to sign the agreement reached on May 18, 1962, not only provides a persuasive basis for a finding of bad faith bargaining, it also constitutes, in and of itself, a violation of Section 8(a)(5). *N.L.R.B.* v. *Gene Hyde*, 339 F. 2d 568, 571 (C.A. 9); *Lozano Enterprises* v. *N.L.R.B.*, 327 F. 2d 814, 818-819 (C.A. 9); *N.L.R.B.* v. *Holly-General Co.*, 305 F. 2d 670, 671-672 (C.A. 9); *N.L.R.B.* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9); *Nesen*, *supra* at 563; see also *N.L.R.B.* v. *Katz*, 369 U.S. 736; *Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 523-524.

C. *The attempts to undermine the Union's representative status*

In light of the foregoing, there can be no question about the propriety of the Board's determination to

consider Daniel Newman's conduct during October 1961 despite the execution of a settlement agreement in January 1962 covering said conduct. As the agreement itself states, the Board therein agreed not to litigate the October incidents only on the condition that respondent comply with its agreement to retain from committing future related violations. The Supreme Court's holding in *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248, 254-255, is controlling here:

> [The Board] has consistently gone behind [settlement] agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned.

Nor can the Company reasonably deny the impropriety of the October conduct. In assembling the plant employees outside the presence of their Union negotiator, misrepresenting the Union's position on contract issues, suggesting that the Company's contract proposal was "better" for the employees, and telling employees to decide among themselves whether the Company should sign the Union's contract, respondent manifestly subverted the mode of bargaining established by the Act. *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 683-684; *N.L.R.B.* v. *Howe Scale Co.*, 311 F. 2d 502, 504 (C.A. 7); *Quaker State Oil Refining Co.*, v. *N.L.R.B.*, 270 F. 2d 40, 45-46 (C.A. 3), cert. denied, 361 U.S. 917; *N.L.R.B.* v. *Howard-Cooper Corp.*, 259 F. 2d 558

(C.A. 9); *N.L.R.B.* v. *Union Mfg. Co.*, 179 F. 2d 511, 513 (C.A. 5).

II. The Board's Order is Valid and Proper

It is clear that the Board's power to issue remedial orders encompasses the power to order an employer presently to execute a contract which he wrongfully refused to execute in the past. The inevitable lapse of time between the unfair labor practice and the issuance of the Board's order sometimes raises complications, however, as the instant case illustrates. The general directions of the Act, we submit, and the Board's extensive experience in drafting remedial provisions, provide the source for resolving these difficulties.

Thus, Section 10(c) of the Act empowers the Board to order "such affirmative action . . . as will effectuate the policies of this Act." In implementing this mandate, the Board is to seek "a restoration of the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice]." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 199. Because of the "infinite variety of specific situations," Congress has left the task of remedy—"the adaptation of means to end"—to the administrative process subject only to limited judicial review. *Ibid.* Accord: *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. We submit that the Board's remedial order herein, tailored as it is to provide the particular form of redress which the situation warrants, falls well within the broad discretionary power accorded the Board and, consequently, warrants enforcement.

First, the Board's order grants the Union the option of (1) insisting upon present execution of the contract previously negotiated or (2) bargaining with respondent for a new arrangement. Since 18 months had elapsed between the respondent's wrongful refusal and the issuance of the Board's order, with attendant interim changes in such matters as the current cost of living, this optional feature of the remedy clearly constitutes a sensible accomodation. And in cases such as *N.L.R.B.* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920, 922 (C.A. 2); and *N.L.R.B.* v. *WATE, Inc.*, 310 F. 2d 700 (C.A. 6), enf'g *per curiam* 132 NLRB 1338, 1339, the Courts have enforced contract-refusal remedies containing this "optional" feature.

Second, respondent objected to the Board order below on the ground that it would require the execution of a contract "for a term larger than that specified in the contract—here, one year" (R. 47). This contention is clearly lacking in merit. The contract here provided for an effective duration of one year from May 18, 1962, *and from year to year thereafter* subject to timely notice of a contrary intent (*supra*, p. 9), and no such notice was ever given. Hence, the contract reached by the parties itself contemplated that the agreement embodied therein sought might well endure indefinitely. Indeed, in *N.L.R.B.* v. *International Hod Carriers', etc. Local 300*, 287 F. 2d 605, 610 (C.A. 9), the contract before the Court contained an identical provision regarding duration and the Court characterized it as "common practice . . . [of] recognized . . . validity" for union contracts

thereby to provide for long-range prospective application.

A different problem might be presented had the respondent, during the pendency of this case before the Board, given the Union notice of intention to terminate the contract—without prejudice, of course, to its allegation that no contract had ever become binding. Obviously, there is an element of artificiality in such a gesture, but that cannot aid respondent. Had respondent executed the contract when requested, as required by law, procedures for terminating the contract would have been clearly established. Only because of respondent's own wrongdoing was it saddled with the awkwardness of seeking to terminate a contract whose current existence it was simultaneously disputing. See *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376, 383-385.

Compare *N.L.R.B.* v. *Brotherhood of Painters, etc., Local No. 1385*, 334 F. 2d 729, 731-732 (C.A. 7). There, a Union had unlawfully refused to execute a contract with a duration clause, like the one involved herein, providing for a term of one year with automatic renewal thereafter absent timely notice. The Union was not required to execute the contract, however, because (1) the one year period had already expired *and* (2) timely notice had been given to forestall automatic renewal.

Besides, even if respondent could show here that the contract would have expired prior to the issuance of the Board's order, that would not mar the appropriateness of the Board's instant remedy. To restore the status quo, protect the rights which were

granted employees in the contract, and encourage parties to execute their agreed-upon contracts, the Board should be permitted to order present execution of past contracts except where the circumstances show that such an order would be "a patent attempt to achieve ends other than those which can fairly be read to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 540. No such circumstances exist here.

To deny the Board that power in a case where the administrative process does not conclude until after the contract's stated term would merely "encourage purposeful delay." *Warrensburg, supra*, 340 F. 2d at 923, without satisfying any significant countervailing interest of the respondent. Whether the agreed-upon contract would have expired before or after the issuance of a Board order is, after all, an extraneous consideration, which will frequently turn upon matters wholly insignificant in terms of the remedial process. Congress, fully mindful that Board remedial orders necessarily issue only after the passage of considerable periods of time, has not introduced any relevant time limitation upon the Board and the Courts have, accordingly, refused to order immunity for the wrongdoers during the pendency of Board litigation.

Thus, in *N.L.R.B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U.S. 685, the Supreme Court refused to reduce the effective period of a Board backpay award despite an allegation of Board delay in entering a final order. Such a delay, the Court acknowledged, would be unfortunate for all parties concerned, but

the victim of the unfair labor practice, it was held, should not be penalized for it. 315 U.S. at 697-698. Here, *a fortiori*, the Union should not be deprived of a remedy otherwise appropriate even if Board litigation did not conclude within the period of the contract. For here, it is respondent's wrongful conduct and not agency delay that consumed the contract period.

Closely in point is *Henry I. Siegel* v. *N.L.R.B.*, 340 F. 2d 309 (C.A. 2). There, the employer had wrongfully refused to incorporate a certain provision in his 1961 contract with the union. Prior to the issuance of a Board remedial order, the 1961 contract expired by its terms and the parties negotiated a new contract. Nonetheless, the Board ordered incorporation in a written and signed document of the previously omitted provision, and the Court approved:

> "A party guilty of an unlawful refusal to bargain in connection with a particular contract does not become vested with immunity because the Board's processes have not been completed before the signature of a successor agreement." [340 F. 2d at 311]

And in *WATE, Inc., supra*, the parties had also agreed upon a contract for one year with an automatic renewal provision. The Company should have signed the agreement on August 29, 1961. The Court enforced the Board's contract-execution remedy, although its effect was to render the contract effective after the date it might have expired by its terms, absent the unfair labor practice.[6]

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[6] See also *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, n. 16, where the Supreme Court found without merit a respondent's re-

This is not to say that the intended duration of the dishonored contract is not a relevant consideration for the Board in its task of shaping a remedy. Indeed, in some cases, the Board itself has reduced the period of future effectiveness of a contract when ordering its execution. See *Sheet Metal Workers Union Local No. 65*, 120 NLRB 1678, 1679 and *Warrensburg Board & Paper Co.*, 143 NLRB 398, 399. In the cited cases, however, unlike this case, the respondents showed that they had already put into effect the contract provisions bargained for, hence mitigating the damage left to be remedied by the Board's order. We submit simply that a respondent may not succeed in profiting from his unfair practice merely because his unlawful refusal to sign may continue beyond the intended period of the contract.

For similar reasons, respondent may not here object to the Board's order because the original order contained a latent ambiguity which the Board subsequently clarified. Respondent argued before the Board that it was misled by the ambiguity, and thought that compliance therewith could be achieved by executing the contract to become effective for one year following signature (with automatic renewal) (R. 47). In its clarifying order, however, the Board specified that the contract was required to be effective from May 18, 1962—the date it should have

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quest for denial of a bargaining order on the grounds of lapse of time and loss of majority status by the union in the period between the occurrence of the unfair labor practice and the Board's final order. Accord: *N.L.R.B.* v. *International Union, Progressive Mine Workers of America*, 375 U.S. 396, reversing *per curiam* 319 F. 2d 428, 437 ((C.A. 7).

been signed—until it expired by its own terms (R. 44-45).

Assuming *arguendo* that respondent was misled or confused, no bar to enforcement is raised. This case would thus present a situation like that in *Electric Vacuum Cleaners, supra*, where the Supreme Court agreed with the Board that a respondent may be held accountable for the entire period of damage to the victim, even when that period has been prolonged as a result of administrative mishap. See also *N.L.R.B.* v. *A.P.W. Products Co., Inc.*, 316 F. 2d 899 (C.A. 2), where a respondent was required to pay backpay for the period of the Trial Examiner's interim and erroneous ruling dismissing the complaint.

When the Board, on its own motion, noted that its order had not expressly and clearly resolved the question of effective duration of the contract to be signed, the problem posed was whether the period of time between the original order and the clarifying order should be included in the Company's remedial responsibility. To exculpate respondent for this period would necessarily deprive the Union and the employees of benefits lawfully earned, thereby aiding the wrongdoer at the expense of the wronged. The Board was surely justified, therefore, in refusing to suspend respondent's liability during the interim and in choosing the remedy which more adequately repaired the unlawful damage.

Moreover, respondent did not, after issuance of the Board's original order, petition the Board to clarify its order; nor did it offer to put the bargained-for

contract terms into effect pending resolution of its dispute over the interpretation of the Board's order. Accordingly, respondent has not been prejudiced by, or changed its position in reliance upon, the Board's original order. Hence, for purposes of analysis, the ambiguity in that may be ignored. This case is no different than it would have been had no Board order issued at all until September 1964 and had respondent then opposed enforcement on the ground of Board delay. *Electric Vacuum Cleaner*, *supra*, and the analysis already presented, *supra*, pp. 19-20, disposes of that contention.

Respondent has also contended that the continued passage of time during litigation meant that the Board's clarifying order amounted to a new order, modifying the original remedy, because a longer effective contract duration was thereby required. In part, this is sheer semantics. If the Board decided in 1963 that respondent should execute its contract upon request, to be effective from May 1962, then the issuance of an identical order in 1964 does not "modify" the original order. What is "modified" is not the order but the cost of compliance therewith, and it is only respondent's inaction during the interim which causes that "modification." [7]

Of course, if the Board had originally intended to require the contract to be effective only in the period

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[7] As this Court has noted in analogous circumstances, "Labor-management relations are a continuum. Any rule that would hold them in a state of suspended animation during the pendency of an unfair labor practice charge would, in our view, be most unfortunate." *Pacific Coast Ass'n of Pulp and Paper Mfgrs.* v. *N.L.R.B.*, 304 F. 2d 760, 765.

following its execution and then issued a subsequent order requiring the effective period to begin as of respondent's refusal to sign, this *would* constitute a modification of the original order and respondent would be entitled to "reasonable notice" prior thereto. Section 10(d) of the Act. But that is not this case. Here, the Board itself recited that its September 1964 order was merely "to clarify" the remedy already issued (R. 44). Respondent's argument to the contrary, i.e., that the Board had originally intended a different result than the one finally specified, was presented to the Board for consideration (R. 47) and was rejected (R. 50).[8]

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[8] Respondent relied upon the fact that, in its original order, the Board characterized the contract as a "1-year agreement." Consequently, respondent argued, the Board evidenced an intention that respondent not be bound by the contract for longer than a 1-year period. But the fair inferences to be drawn from the Board's use of this phrase become apparent when it is placed back in context:

> However, more than a year has elapsed since the 1-year agreement was reached between the negotiators for the Union and the Respondent and it is not clear whether the Union would now desire to submit this agreement to its members for ratification (R. 42).

Obviously, the Board was intending not to reduce the period of respondent's liability by this phrase, or even to describe the contract fully, but merely to indicate why the union was entitled to bargain for a new contract rather than insist upon the old one.

Much more revealing of the Board's intention is the fact that it supported its original remedial order by express citation of the *Warrensburg*, case (R. 42). There, as here, compliance with the Board's order required the respondent to execute a contract *to be effective from the date it should have been signed.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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August 1965.

CERTIFICATE

The undersigned certifies that he has examined the provision of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other

terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable

grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

The following table of exhibits referred to in the Board's brief is presented pursuant to Rule 18(f) of the Rules of the Court. References are to the typewritten transcript of record ("Tr."):

GENERAL COUNSEL'S EXHIBITS

Number	Identified	Offered	Received in evidence
7	65	90	91
8	65	91	91
10	66	75	75
11	66	75	76

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